Supreme Court, U.S.
FILED
MAR 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COMPANHIA DE NAVEGACAO
LLOYD BRASILEIRO,

Petitioner,

—v.—

ALLIED CHEMICAL INTERNATIONAL CORP.,

Respondent.

OBJECTIONS TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF IN OPPOSITION TO AMICUS CURIAE BRIEF

IRVING RONALD STORCH
Counsel for Respondent
One Old Country Road
Carle Place, New York 11514
(516) 294-3160

No. 85-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COMPANHIA DE NAVEGACAO
LLOYD BRASILEIRO,

Petitioner,

—v.—

ALLIED CHEMICAL INTERNATIONAL CORP.,

Respondent.

OBJECTIONS TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Respondent respectfully objects to the motion of applicants Inter-American Freight Conference, Sections A and D (IAFC) for leave to file a brief *amicus curiae* in this case, for the following reasons:

(1) The petitioner is an acknowledged member of the applicants conference of ocean carriers and has the identical interest and perspective in protecting the integrity of the tariff as do the applicants, and thus, there is no reason to believe that petitioner has not adequately presented all legal arguments with respect to the tariff. Assuming, *arguendo*, that the tariff is central to at

least one aspect of the Court of Appeals decision below, petitioner's ability to withstand a challenge to an IAFC tariff, without IAFC assistance, was amply demonstrated in one of the cases cited by the applicants in its own Brief (p. 5), *Gilbert Imported Hardwoods, Inc. v. 245 Packages of Guatambu Squares, et al.* (including Companhia De Navagacao Lloyd Brasileiro), 508 F.2d 1116 (5th Cir. 1975). It should be evident that applicants are so closely linked in interest to petitioner that granting this motion would simply add another partisan to the case for no significant reason.

(2) Applicants have stated, in support of its motion, that petitioner has not presented the tariff for the Court's consideration (p. ii). On its face, therefore, applicants' motion should be denied under this Court's well-settled rule that it will not consider arguments by *amicus curiae* not advanced by the parties, *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, n.2, p.60 (1981), *Bell v. Wolfish*, 441 U.S. 520, n.13, p.531 (1979), *Knetsch v. United States*, 364 U.S. 361, 370 (1960). If on the other hand, it is deemed that petitioner has presented the tariff for the Court's consideration, then applicants' reason for entering the case as *amicus curiae* lacks factual support and its motion likewise should be denied.

WHEREFORE, it is respectfully requested that the instant motion be denied.

Respectfully submitted,

IRVING RONALD STORCH
Counsel for Respondent

Dated: March 25, 1986

TABLE OF CONTENTS

	Page
Table of Authorities	iv
Argument	1
1. The Tariff Provisions Not Included In The Record Should Not Be Considered On This Petition	1
2. The Decision Below Can Be Sustained Without Reference To The Tariff	3
Conclusion	4

TABLE OF AUTHORITIES

	Page
CASES:	
Bell v. Wolfish, 441 U.S. 520, n.13, p.531 (1979)	ii
Gilbert Imported Hardwoods, Inc. v. 245 Packages of Guatambu Squares, et al, 508 F.2d 1116 (1975)	ii
Knetsch v. United States, 364 U.S. 361, 370 (1960)	ii
Singleton v. Wulff, 428 U.S. 106, 120 (1976)	2
United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, n.2, p.60 (1981)	ii

No. 85-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COMPANHIA DE NAVEGACAO
LLOYD BRASILEIRO,

Petitioner,

VS.

ALLIED CHEMICAL INTERNATIONAL CORP.,

Respondent.

BRIEF IN OPPOSITION TO *AMICUS CURIAE* BRIEF

On the assumption that the motion of applicants Inter-American Freight Conference, Section A and D to file *amicus curiae* brief is granted, this brief is submitted in opposition thereto and is limited only to the issue advanced by the applicants.

Argument

1. *The Tariff Provisions Not Included in the Record Should Not be Considered on this Petition.*

This case was decided in the District Court on stipulated facts which included shipping documents and provisions of petitioner's (and applicants') tariff. Those provisions did not include the provisions now offered by applicants in its Appendix pages

A-1, A-2, A-3 and A-4 attached to its *amicus curiae* brief*. It is a further attempt, this time by applicants, to introduce new evidence at the appellate level which was not part of the record below and should once again be rejected, as it was by the Court of Appeals. While petitioner does not present the added provisions of the tariff in its Petition for Certiorari, petitioner did so in its brief to the Court of Appeals. In rejecting this effort, the Court of Appeals said:

> "And despite Lloyd's attempts to introduce new evidence at this stage, we are limited to the record, and the record clearly shows that the freight rate was based on the value of the goods." (Petition for Certiorari, A-28)

The guiding principle on whether new issues may be considered on appeal was enunciated by this Court in the case of *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), where it said:

> "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals to be exercised on the facts of individual cases."

In light of this principle and the facts and circumstances of the case, it cannot be concluded that the Court of Appeals abused its discretion in rejecting the introduction of new evidence, consisting of a provision of petitioner's tariff not before the District Court.

While a tariff may have the force of law once it is established, the determination of the applicable tariff and the freight rates are always questions of fact. The tariff provision which was made part of the record on appeal was furnished by petitioner to respondent's counsel on discovery and was made the subject of a stipulation of facts entered into by the parties which formed the basis for the District Court's Finding 21 (A-6, Petition for Certiorari).

---

* Only Appendix page A-5 was part of the record below.

Lastly, it should be noted that to permit petitioner, through the help of applicants, to submit new matter at this level of review would be a radical departure from our system of jurisprudence and would be far more damaging than the alleged impossible choice faced by members of the conference in the future. Assuming that Rule 12 of the IAFC tariff constitutes relevant matter on the issue of choice of rates in a similar case, the members would be well advised to raise that issue on the trial level. Clarity and more explicit bills of lading and tariffs would also obviate any dilemma they might face generally on the package limitation issue.

2. *The Decision Below Can Be Sustained Without Reference To The Tariff.*

At the outset, it should be observed that the petitioner's and applicants' tariff is only peripherally involved in this case. The issue to which it relates, i.e. whether respondent had a choice of rates when it declared the nature and value of the goods, only becomes relevant if the pallet is deemed to be a package within the $500 per package Cogsa limitation of liability provisions. The District Court did not so find and the Court of Appeals, while concluding that the parties' intent on that issue was ambiguous, did not set aside the District Court's finding as being clearly erroneous.

Having found the petitioner's bill of lading to be a contract of adhesion, the Court of Appeals could have ended the case at that point by simply stating that the District Court's finding that the pallet was not a package was not clearly erroneous or that the ambiguity in the bill of lading should be resolved against the petitioner.

Accordingly, the decisions below could be sustained without any reference to the tariff altogether, and therefore the additional provisions of the tariff offered by applicants would not alter the result.

Conclusion

Respondent therefore respectfully prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

Irving Ronald Storch
Counsel for Respondent